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Nos. 83-1171 and 83-1173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

EXXON CORPORATION, *et al.*,
Petitioners,
v.
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION OF NAMED PIPELINE RESPONDENTS

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QUESTIONS PRESENTED

1. The Congress, in the Natural Gas Policy Act of 1978 (NGPA), granted detailed and explicit price increases relative to some categories of natural gas, and explicitly based the price limits for other categories upon prices previously set by the Federal Energy Regulatory Commission (FERC). Did the Court of Appeals err when it held that Congress did not, as the FERC claims, implicitly and without any indication in the language of the NGPA or legislative history thereof, substantially increase all such prices *further*, by changing the method of calculating the heat content of the gas from that which the FERC had required prior to, and for a period after, enactment of the NGPA?

2. Are petitioners correct in, and may they rely upon, their subsidiary contention in this Court that the NGPA gives the FERC discretion to decide which method of heat content calculation to utilize, when the FERC itself, particularly in the Court of Appeals, based its position upon a different contention; the claim that the *NGPA requires* use of a given method?

3. If it is assumed, arguendo, that the FERC has discretion under the NGPA to choose a heat content calculation method, did the Commission err, in the orders under review, in failing to provide proper notice and opportunity for comment, by not appropriately explaining and justifying its decision, by applying the changed policy therein retroactively, and by failing to provide for unconditional recovery, by the purchasers of the gas, of the prices increased by such method?

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BRIEF IN OPPOSITION OF NAMED PIPELINE RESPONDENTS *

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* This brief is filed by Interstate Natural Gas Association of America, an association of natural gas pipeline companies, ANR Pipeline Company (formerly Michigan Wisconsin Pipe Line Company), Natural Gas Pipeline Company of America and Transcontinental Gas Pipe Line Corporation, all Respondents below. It is also filed by Northern Natural Gas Company, Division of InterNorth, Inc. and Mississippi River Transmission Corporation, Intervenors below.

COUNTER STATEMENT OF THE CASE

The basic and dispositive issue in these proceedings is a question of statutory interpretation, concerning the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3342.

These proceedings involve the method to be used to determine the heat content of natural gas, which in turn is used to determine the maximum amount to be paid to producers for gas sold. The issues here do not involve contract interpretation or meaning. Rather, the question is the meaning of a statute; the NGPA. The issues here do not involve, as petitioners assert, technical questions of which method of measuring heat content is most accurate or mechanically acceptable, so no question of technical FERC, or industry, expertise is involved. Rather, the question is whether the Congress, when it prescribed maximum producer prices, in the NGPA, must be presumed to have intended to continue the heat content calculation procedure which the Federal Energy Regulatory Commission (FERC)[1] had required to be used for many years, including when the NGPA was enacted, or whether Congress should instead be presumed to have changed to another procedure, *without so indicating in any way, in the language or legislative history of the NGPA*. The effect of that change, claimed by Petitioners, would be to increase the maximum lawful prices set by Congress by an average of 1.7%.

Prior to the NGPA, the FERC, under the Natural Gas Act (NGA), 15 U.S.C. §§ 717-717w, fixed ceiling prices for producer sales of interstate gas, while prices for sales of intrastate gas were controlled by the states or not at all. The FERC established ceiling prices stated as so many cents per each one thousand cubic feet

[1] FERC is here used to include its predecessor agency, the Federal Power Commission.

(Mcf) of gas sold. However, by 1965 [2], pursuant to a 1961 Statement of Proposed General Policy,[3] the FERC provided that the per Mcf ceiling prices must be adjusted to reflect the heat content, measured in British Thermal Units (Btu), of the gas sold. That is, if the number of Btu's per Mcf of gas sold was more or less than the norm of 1000 Btu's per Mcf, the ceiling price was increased or decreased proportionately. Thus, if a method of determining the Btu content of the gas sold in a month produced a lesser number of Btu's than an alternative measurement method, the result was that the ceiling price (and thus the gross dollars received by the producer for the subject gas) would be less than under the alternative method. Therefore, the practical effect was that the ceiling prices fixed by the FERC were, in actuality, on a "per Btu" basis, arrived at in a two step process: state the price per Mcf and then adjust, pro rata, for Btu variation from the norm. Following *Texaco*, that "Btu adjustment" procedure was utilized in the various "area rate" and "national rate" proceedings which fixed the ceiling prices which were in effect, until adopted, and in some situations superseded, by the "maximum lawful prices" fixed by the Congress in the NGPA.[4]

The FERC's *Texaco* order also provided that the calculation of the Btu content of gas sold was made on a "saturated" (or "wet") method. (33 F.P.C. at 1237). That methodology reflects the actual technology of Btu

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[2] *Texaco, Inc.*, 33 F.P.C. 1228, 1237-38.

[3] Docket No. R-200, 26 Fed. Reg. 4614 (1961).

[4] See Area Rate Proceeding (Permian Basin Area), 34 F.P.C. 159, 223-224, 239, 240 (1965); Area Rate Proceeding (Southern Louisiana Area), 46 F.P.C. 86, 142-144 (1971); Just and Reasonable National Rates for Sales of Natural Gas, 52 F.P.C. 1604, 1650, 1651-1652 (1974); Just and Reasonable National Rates for Sales of Natural Gas, 54 F.P.C. 3090, 3123, 3124-3125 (1975); National Rates of Jurisdictional Sales of Natural Gas, 56 F.P.C. 2698, 2806, 2807-2808 (1976). In the 1965 Permian Basin, no adjustment for gas between 1000 and 1050 Btu's was allowed, while the later cases prescribed total proportional adjustment.

measurement, under which measurement is made on the basis of the standard assumption that the gas is saturated with water vapor. The FERC noted, in *Texaco*, that "this standard is accepted by the American Society For Testing Materials and the Natural Gas Industry." 33 F.P.C. at 1237. (*See* Appendix A for the text of the FERC's Statement of Policy which expresses this concept and shows ceiling price adjustments resulting from Btu variation from the 1000 Btu norm.) The "wet" method of Btu calculation was carried forward through all of the above referenced "area rate" and "national rate" proceedings (footnote 4, supra), and Section 2.56a of the FERC's existing Regulations (18 C.F.R. § 2.56a (c)(1) and 18 C.F.R. 2.56b(d)(1)), which was adopted in 1971, still specifically prescribes the "saturated" (wet) method, using the language adopted in *Texaco* in 1965. (*See* Appendix B for the text of such regulation.)

This continued requirement of the "wet" method has not been inadvertent. In Opinion No. 699-H, 52 F.P.C. 1604 (1974), the first national rate proceeding, the FERC specifically considered, and rejected, arguments by producers of gas (including Petitioners here) that the Btu content of gas should be measured on an alternative "as delivered" (or "dry") basis, rather than the "saturated" (or "wet") basis, for payment purposes. In that proceeding, the FERC stated:

> The Producers argue that the heating content (Btu) 'of the gas should be adjusted for the water vapor content in the gas as it is delivered.' In *Texaco, Inc.*, the Commission determined that Btu adjustments should be made *on the saturated basis. This* is the basis which was utilized in the area rate proceedings, and *is the basis that will be adopted in this proceeding. Id.* at 1630 (emphasis added, citations omitted).

Thus, the FERC required that the Btu price adjustment be made by the wet method set forth in Section 2.56 of the Commission's Regulations.

As a result of the above course of FERC and industry action, the situation at the time of the NGPA, in 1978,

was that for over thirteen years, federal policy for interstate gas—which was the sole focus of the NGA and the primary focus of the NGPA—was that allowable ceiling prices were on a per Btu basis, through the Btu adjustment, and Btu's were calculated by the wet (saturated) method.[5] That was the regulatory and industry policy when the NGPA was enacted.

Specifically, the NGPA set up multiple categories of gas (Sections 102 through 109) and prescribed congressionally-fixed prices for gas covered by five sections, adopted the pre-existing FERC fixed "just and reasonable" ceiling price for three sections, and deregulated "Section 107 gas". Deregulation of additional categories in 1985 was also provided. Inflation price escalations over time were also prescribed for the various regulated categories. The maximum lawful prices were fixed in terms of dollars and cents per Btu, thus encompassing the two step FPC process in one step, with the same result: the ceiling price is expressed in terms of a price per Btu. The language of the NGPA does not prescribe the method by which the Btu's in a given package of gas are to be calculated: there is no reference to a "wet" or "dry" or "saturated" or "as delivered" basis. There is no indication of any congressional intention to change the "wet" or "saturated" basis of measurement which existed at the time of enactment of the NGPA. If Congress had changed such measurement basis to the "dry" basis, the result would have been an implicit ceiling price increase in each category of gas of about 1.7%, on average, which would have been in addition to the explicit price increases prescribed by the NGPA.

On November 15, 1978, two weeks before the provisions of the NGPA were to be effective and required to be im-

[5] In the intrastate markets, which were not within federal oversight, practices as to Btu adjustment of prices, and Btu measurement methodology, depended upon contract terms and/or state requirements. The extent to which that involved deviation from the saturated method, if any, is not in the record herein, and is not known.

plemented, the FERC issued a "Notice of Proposed Rulemaking" in Docket No. RM79-3 (43 *Fed. Reg.* 53270 (1978)), proposing interim regulations to implement certain provisions of the NGPA, including a § 270.204 which is virtually identical to its then existing § 2.56a. Thus, the Commission then had two consistent regulations, one under the NGA and one under the NGPA, each of which called for Btu measurement *on a saturated basis.* That 1978 regulation stated:

> For purposes of determining the number of Btu's per unit volume of natural gas, the Btu content of one cubic foot of natural gas is the number of Btu's produced by the combustion, at constant pressure, of the amount of gas which would occupy a volume of 1.0 cubic foot at a temperature of 60 degrees Fahrenheit, *saturated with water vapor* and under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquids state. 43 *Fed. Reg.* at 53333 (emphasis added).

This proposed regulation, adopted by the Commission, effective December 1, 1978, gave no suggestion, in the above language or accompanying order, that the Commission proposed to *change* its prior Btu measurement practice, as the Commission now claims it did. In fact, all parties, including a number of gas producers, believed that the FERC regulation continued to provide for measurement of Btu content on a saturated basis, as the language of the interim regulation clearly states, and sought judicial review as a result.[6] That regulation constitutes

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[6] Application of Indicated Producers for Rehearing, FERC Docket No. RM79-3, filed February 2, 1979. The Commission denied this application without comment in its "Order Granting in Part and

[footnote continued on next page]

the FERC's contemporaneous interpretation of the NGPA relative to the issue here.

Over 19 months later, after comments, the Commission issued a final version of § 270.204, which was somewhat changed in format, but the same in substance as the earlier version *and continued to require the "saturated" method.* (Order No. 93, 45 *Fed. Reg.* 49077, July 23, 1980).[7] But the text of the *order* says, in a few sentences, that the Btu content, for maximum price purposes, was to be computed on the "as delivered basis", rather than the historically used saturated basis. This alleged "clarification", a major change in Commission policy, was done without elaboration, and was not reflected, in any way, in the actual regulation which was promulgated by that same Order. Nine months later, on April 24, 1981, rehearing was denied, by Order No. 93-A, 15 F.E.R.C. ¶ 61,075 (1981). That order on rehearing

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Denying in Part Applications for Rehearing of the Interim Regulations", on April 19, 1979 in FERC Docket No. RM79-3. In Ecee, Inc. v. FERC, No. 79-1171, 611 F.2d 554 (5th Cir. 1980), the producers again asserted, in seeking judicial review, that the Commission had improperly adopted the "saturated" basis for measuring Btu content. This issue was mooted, however, before the issuance of a decision in Ecee, because of the issuance of Order No. 93 by the Commission.

[7] The text of the regulation adopted in Order No. 93 read:

§ 270.204 *Btu content per cubic foot of natural gas.*

(a) *Measurement.* The Btu content of one cubic foot of natural gas *under the standard conditions specified in paragraph (b)* of this section is the number of Btu's produced by the complete combustion of such cubic foot of gas, at constant pressure with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by such combustion is condensed to a liquid state.

(b) *Standards conditions.* The standard conditions for purposes of paragraph (a) of this section are as follows: The gas is *saturated with water vapor* at 60 degrees Fahrenheit under a pressure equivalent to that of 30.00 inches of mercury at 32 degrees Fahrenheit, under standard gravitational force (980.665 centimeters per second squared). Emphasis added.

was the Commission's first claim that it had earlier intended to adopt a dry measurement rule. It also provided, for the first time, that the rule would be retroactive to December 1, 1978. As a result, consumers would be required to make hundreds of millions of dollars of retroactive payments. (Now, in 1984, that amount has grown to one or more billion dollars.) It was not until December 24, 1981, after FERC requested remand by the Court of Appeals, that the FERC amended § 270.204 by adding a new subsection (c):

> (c) *Application of the maximum lawful price.* The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale.

Thus, the policy of determining the number of Btu's to which the price is to be applied by the "as delivered" measurement basis, rather than the formerly standard "saturated basis," was not incorporated as part of the Commission's regulations until December 24, *1981*, but the Commission is attempting to enforce it retroactively to December 1, *1978*.

On review, the Court below held that the NGPA precluded the FERC from changing the Btu calculation method previously employed: that Congress had explicitly stated the ceiling price changes which it wished to impose, and had not, *sub silentio*, imposed a further average 1.7% increase by changing the Btu method, without ever giving any indication that it did so or intended to do so. Rehearing was denied, requests for stay were granted and requests for extension of stay were denied, by the Court below.

SUMMARY OF REASONS WHY THE PETITIONS SHOULD NOT BE GRANTED

1. The most basic reason for denial of the Petitions for Certiorari in these proceedings is that the decision of the Court of Appeals is correct. It is an exercise of the basic judicial function of interpretation of statutory language. The Court below examined the complete record and exercised sound reasoning and research, fully taking into account the arguments of the Petitioners. As a result, there is no significant legal principle which was ignored or misapplied by the Court below, or which requires review by this Court.

The claim of Petitioners, stripped to its essentials, is that the Congress required a change to the dry method of Btu content measurement:

a. Even though there is *no* indication in the language of the NGPA or its legislative history that the Congress intended to do so;

b. Even though such step would have reversed and abandoned over thirten years of prior FERC practice, which required the wet method;

c. Even though use of the dry method would increase the maximum lawful prices which producers could charge for gas by about 1.7%, on average, over the prices specifically stated in great detail in the NGPA;

d. Even though the only method of Btu measurement with which the Congress and its draftsmen could reasonably have been familiar was the FPC-prescribed wet method, which had been in effect for over thirteen years.

It must be remembered that the NGPA, as to three categories of gas, actually adopted the "just and reasonable" ceiling prices which the FPC had earlier fixed, as the "maximum lawful price" under the NGPA. The NGPA provides that those prices are only to be changed by a carefully prescribed inflation adjustment. But having done that, Petitioners argue that Congress *silently* increased those prices by changing, without mention, the

wet Btu measurement method which the Commission had utilized along with those prices. That is simply not credible.

While the language of the NGPA is silent on Btu measurement, the limited legislative history which is relevant provides further support for the position that Congress did not change the prior wet measurement method.

It is a sound principle of law that prior practices—in this case, of the administrative agency which operates under the NGPA and industry practices—should not be presumed or interpreted to be changed, unless the statute clearly so provides.

The Court of Appeals properly recognized the above factors. The Court was also correct in fully considering, and rejecting, Petitioners' arguments which seek to draw support for the dry method from unconnected, irrelevant facts and incorrect inferences. In doing so, the Court gave full and proper deference to the FERC's decision, and the support advanced therefor, but simply found it not credible, not supported, and not consistent with the NGPA. The Court of Appeals recognized that the initial interpretation by the FERC, made contemporaneously with the NGPA, prescribed the wet method, and it was only in later orders that the change to the dry method was attempted. That fact strongly undercuts the FERC's present claimed interpretation of the statute.

2. The claim of Petitioners, now raised in this Court, that if the NGPA does not require the dry method of measurement, it at least permits the FERC to exercise "discretion" and impose that method upon purchasers and consumers of gas, is in error. Petitioners claimed no right to exercise such discretion in their briefs to the Court of Appeals. The FERC disavowed such right of discretion when it made its rule effective retroactively, stating that its rule was interpretative of the NGPA, rather than substantive. Thus, Petitioners are barred from making such claim now. Further, a change of

methodology which alters the prices prescribed by Congress, as the change to a dry method of measurement would do, is not within the FERC's authority under the NGPA.

3. Even if it were held that the FERC had and has discretion to change Btu measurement methods, its orders here under review would still be invalid on grounds the Court of Appeals did not reach:

a. Such orders provide no explanation or basis for such change of position on a discretionary basis: they concentrate on the erroneous claim that the NGPA requires such result. FERC's brief below disclaims the authority it now claims.

b. Those orders are invalid procedurally, in that they gave inadequate notice of the proposed change, did not allow proper opportunity to comment thereon, and did not provide adequately for recovery, by the pipeline purchasers of gas from their customers, of the increased costs which would be caused by change to the dry method. In addition, the FERC orders here under review provide for retroactive application of the change of policy, in violation of applicable law, with consequent loss to consumers, and to at least those pipelines not subject to FERC jurisdiction.

4. There is no conflict of decisions between Courts of Appeals to be resolved here, and none will occur in the future on the issue involved here.

5. The Court of Appeals decision does not cause administrative or regulatory burdens for the FERC or the industry: it simply continues the use of practices used by the industry for many years, pursuant to FERC direction.

REASONS WHY THE PETITIONS SHOULD NOT BE GRANTED

I. THE INTERPRETATION BY THE COURT OF APPEALS THAT THE NGPA REQUIRES CONTINUED USE OF THE WET METHOD OF BTU MEASUREMENT IS CORRECT AND NO SIGNIFICANT LEGAL ISSUES REMAIN FOR THIS COURT TO DECIDE

The language of the NGPA does not specify whether the Btu content of natural gas sold in the United States is to be measured on the pre-existing wet, or saturated, method which had been used in interstate commerce, pursuant to FERC regulation, for over thirteen years prior to the NGPA, or by the dry method proposed by Petitioners herein. The Court of Appeals, and the FERC before it, was thus faced with a question of statutory interpretation on the basis of the basic statutory scheme of the NGPA, the context in which the NGPA was drafted and enacted, and explicit legislative history. As shown earlier, the context of the Act was that since 1965, following a 1961 Statement of Proposed General Policy, the FERC had required use of the wet method of Btu measurement for all producer sales in interstate commerce. The Congress had, of course, dealt with natural gas in interstate commerce for many years, but not intrastate commerce. The NGPA substituted congressionally-set "maximum lawful prices" for FPC-set ceiling prices, and applied them to all gas sales by producers. In doing so, the Congress devised wholly new price ceilings for some categories of regulated gas, including intrastate gas, and adopted prior FERC-fixed prices for other categories of gas.

To accept the position of Petitioners herein, one must:

a. Accept the argument that the Congress expressly and explicitly chose those specific prices for all of the detailed categories of regulated gas which the NGPA creates, carefully devised an inflation adjustment to be applied to such prices over the years, and then implicitly, without ever mentioning it in the statute or the legisla-

tive history, tossed in another 1.7% price increase by silently changing the prior FERC Btu measurement method. That claim is not credible, and is inconsistent with the pattern of the NGPA.

b. Acceptance of Petitioners' thesis also requires the belief that when Congress expressly adopted, for some categories of gas,[8] as the NGPA prices, the actual ceiling prices previously set by the FERC, it also, without any mention in the NGPA or legislative history, effectively *increased* those prices by changing the Btu measurement method which the FPC had used in establishing those prices. The Court of Appeals correctly found that such claimed deviation from the NGPA's pricing scheme was contrary to the NGPA.[9]

c. Acceptance of Petitioners' position also requires one to ignore the fact that the FERC's initial rule, issued contemporaneously with the passage of the NGPA, called for the use of the *wet* method of Btu measurement. That was on November 14, 1978, between the November 9, 1978 enactment of the NGPA and its December 1, 1978 effective date. It was not until July 16, *1980*, that the Commission issued a brief, unexplained passage in an order, which indicated that a change to the dry method must be made. And it was not until April 24, *1981* that a longer attempt to explain such change was issued, and not until December 1, 1981 that the regulations were finally changed to provide for the dry method. Thus, the change which the FERC now claims was mandated by the NGPA was not recognized contemporaneously by the FERC: instead, the contemporaneous statutory construction was to the contrary. The Court of Appeals properly noted this at 716 F.2d at 6-9.

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[8] Sections 104, 106a and 109.

[9] It is also not credible that having adopted the Btu measurement used by the FERC, for those NGPA gas categories which are based on FERC just and reasonable rates, that Congress, without explanation, adopted a different Btu content measurement method for the other categories of gas. No one suggests that.

By maintaining the use of the wet Btu measurement method, the Court of Appeals holding is compatible with the context of the passage of the NGPA, and is fully compatible with—indeed, demanded by—the legal principle that a change in prior regulatory practices should not be inferred in statutory interpretation, unless the statute or its legislative history clearly indicates that such change was intended. Neither the language nor the legislative history of the NGPA provide for a change to the dry measurement methodology. Thus, a controlling principle is that stated in *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978):

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change. [citations omitted] So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute. 434 U.S. at 581.

In the instant proceeding, the NGPA adopted the FERC's own ceiling prices for some categories of gas, and did *not* provide for a change of the Btu calculation method which the FERC had required be used with such prices.[10]

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[10] See Espinoza v. Farah Manufacturing Co., 414 U.S. 86 (1973), where the Court noted that "The legislative history of that section reveals no mention of any intent on Congress' part to reverse the long standing practice of requiring federal employees to be U.S. Citizens." See also Ozawa v. U.S., 260 U.S. 178, 194 (1922), finding a claimed *sub silentio* change of prior policy to be not credible and City of New York v. U.S. Dept. of Transportation, 715 F.2d 732, 741 (2d Cir. 1983), stating there must be "explicit statutory language or other clear manifestation of Congressional intent" before it will be held to have made "such a basic change in regulatory procedure", and holding that such intent, as here, was not present. See also, Paul v. U.S., 371 U.S. 245 (1965), and Toilet Goods Association v. Finch, 419 F.2d 21, 27 (2d Cir. 1969), stating:

[footnote continued on next page]

Similarly, in *Watt* v. *Alaska*, 451 U.S. 259 (1981), this Court held that a statutory change did not allow the administering agency to change its long standing practices:

> The silence of Congress may provide a treacherous guide to its intent. *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4, 11, 86 L.Ed. 1229, 61 S. Ct. 875 (1942). Here, however, it is almost inconceivable that Congress knowingly would have changed substantially a long-standing formula for distribution of substantial funds without a word of comment. 451 U.S. at 271 (fn. 13).[11]

The fact that Congress did not affirmatively express a desire to change measurement methodology is enough to support the Court of Appeals decision. But here, as shown below, the legislative history goes further, to show that Congress was aware of the FERC's saturated method and expected that it would continue to be employed.

The FERC itself has admitted—indeed, urged—the validity of that principle, specifically relative to the NGPA, stating:

> The NGPA rests upon the prevailing industry practices rooted in the regulatory context that ex-

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> [I]t is a good principle that before a court will hold Congress to have made a basic change in regulatory procedures, legislators must either use plain language or give other clear manifestation of intent . . . . In the absence of this it is reasonable to assume that both those legislators who were knowledgeable and those who voted on faith wished to leave things as they were. (citation omitted).

See also, Bush v. Oceans International, 621 F.2d 207, 211 n. 4 (5th Cir. 1980), stating "a change in the status quo should not be inferred unless Congress has unmistakably indicated a wish to the contrary", and Laborers International Union v. NLRB, 567 F.2d 1006, 1013 (D.C. Cir. 1977), which states the principles almost identically.

[11] See also, American Textile Manufacturers v. Donovan, 452 U.S. 485 (1981).

> isted at its enactment. In short, the NGPA generally accepts the existent *status quo* of industry practices under the Natural Gas Act, and where a change was intended, Congress spoke clearly. (Mimeo, p. 10)[12]

At Mimeo page 16, the Commission also said "the NGPA can only be understood in the regulatory context that surrounded its enactment," at Mimeo page 12 said that the protestor's position "is based upon a misunderstanding of the NGPA and the historical backdrop that existed at the time the NGPA was enacted", and at Mimeo page 5, said that "[a]s we have seen in other contexts, Congress did not enact Title I on a blank slate, but in the context of prevailing practices under the Natural Gas Act." (footnote omitted) And finally, at Mimeo page 8, the FERC said "the Commission cannot assume, in the context of regulation under the *Natural Gas Act* and the prevailing economic climate in 1978, that Congress intended" to adopt the protestor's position. (emphasis added). In this case, the FERC errs by ignoring its own principles.

Some of the legislative history which supports the conclusion that Congress intended to continue the use of the FPC's wet method is cited by the Court of Appeals at 716 F.2d 12-13. The Report of the House Committee on Interstate and Foreign Commerce explained, relative to H.R. 8444, one of the bills which was consolidated and revised into the NGPA, that:

> The reference to FPC-determined just and reasonable prices and contract prices for purposes of determining maximum lawful prices under section 405 incorporates *Btu adjustments* and other quality adjustments provided for in *FPC rate determinations* or in the applicable contract. (Rep. No. 95-496, Part 4,

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[12] Declaratory Order in Docket Nos. GP82-50, GP82-51 and GP82-52, relating to pipeline transportation of producer-owned Liquids and Liquid Hydrocarbons, 22 F.E.R.C. ¶ 61,013 (January 17, 1983). A copy thereof has been filed with this brief, for convenience.

95th Cong., 1st Sess. 103 (1977) (footnote omitted, emphasis added).[13]

The above passage shows that in 1977, while Congress was working on the overall legislation which emerged in 1978 as the NGPA, Congress knew of the FERC Btu adjustments and intended that they be subsumed as a part of the price set. All that the FERC's Petition can say in response to this direct evidence of legislative intent is that the reference to the "contract" "might" refer to what Petitioners claim is the "many intrastate contracts" which provide for the dry method. However, the record does not show whether the dry method was actually used in intrastate commerce or, of course, to what extent. What is uncontroverted is that there is more interstate gas than intrastate gas, and *all* interstate gas, and *at least* a substantial part of intrastate gas, was measured on the wet method. Thus, the reference to "FPC rate determinations" was entirely to the wet method, and references to "contract" was *at least* largely to the wet method.[14]

The above legislative history in support of the wet method is also supported by 124 Cong. Rec. 38364 (1978), where Congressman Dingell stated that the "maximum lawful price" under the NGPA "*would be based upon the just and reasonable rate which, but for*

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[13] It should also be noted that the same references to use of "Btu Adjustments" as "provided for in FPC rate determinations" appears in the legislative history of H.R. 6831, a slightly earlier forerunner of the NGPA. Rep. No. 95-543, Vol. 1, at 3. 95th Cong., 1st Sess.

[14] To conjecture that Congress, which had previously dealt with interstate, not intrastate gas, was even familiar with the Btu measurement method *perhaps* used by *some* part of the smaller intrastate market, much less abandoned the interstate wet method which was used for the bulk of the gas nationally, is not supportable. Thus, the Court of Appeals' rejection of that conjecture is correct. The Court of Appeals was being accurate, albeit conservative, when it stated (716 F.2d at 12) that the wet method was the only one with which Congress was "likely" to have been familiar, and the support expressed by that Court for that careful statement is sound.

enactment of this legislation, would have been applicable." (emphasis added). Similarly, at 124 Cong. Rec. 29108-9 (1978), Senator Jackson agreed that the "just and reasonable rates set by the Federal Power Commission and in effect, as of April, 1977 are *frozen* as of that date" except for the inflation adjustment. (emphasis added) Neither Congressman indicated any change in the Btu measurement methodology used by the FERC under the NGA, which would increase prior prices.

In attempting to attack the use by the Court of Appeals of the available legislative history, the FERC Petition (p. 15) makes the statement that the Court of Appeals "overlooked the fact that, prior to the NGPA, the Commission consistently had expressed the applicable NGA rates on a 'per Mcf' basis, with allowance for a Btu adjustment, not on a 'per MMBtu' basis." But as explained earlier, expressing a rate "on a 'per Mcf' basis, *with allowance for Btu adjustment*", is exactly the same as expressing it "on a 'per MMBtu' basis." To say, as the FERC does, "not on a 'per MMBtu' basis" is to incorrectly suggest otherwise, which tries to deny the most basic fact in this case: that the FERC used the wet method, with prices adjusted to a Btu basis, before the NGPA,[15] and the NGPA was passed in that context. The NGPA even adopted FERC prices for some categories of gas, which prices were prescribed on the basis of wet measurement.

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[15] Suggestions by Petitioners that the practice of the FERC of using the wet method was simply a "quality" measure, and was to induce delivery of high Btu gas (see, for example, FERC Br. at 4, 5 and 17) support our point. The "Btu adjustments" under the NGA caused Btu content to affect price, and not just quality control, and the Btu measurement method which was used, and found to be compatible with any desired "incentive" to producers, was the wet method. It was sufficient then, and is now. Further, contrary to Petitioners' vague statements, those Btu adjustments were precisely made, pro-rata to Btu's, and were applied to the applicable ceiling prices which the FERC prescribed for each category of gas, just as the NGPA does by stating prices in per Btu terms.

Petitioners' other arguments were also fully considered, correctly analyzed and properly rejected by the Court of Appeals. They claim that the "as delivered" method (Petitioners' term) matches NGPA's reference to "natural gas delivered during any month". The Court of Appeals properly analyzed and dismissed that word game at 716 F.2d 10-11, holding:

> In short, the Commission fails to convince us of any necessary connection between the delivery point at which the price of gas is fixed and a 'dry' determination of Btu content. Indeed, the Commission itself has established that a 'wet' measurement of Btu content was properly used during rate determinations under the NGA, despite the fact that the underlying NGA commodity unit was also measured on an 'as delivered' basis. *See* Order 93-A at 13.

The other claim of Petitioners is that the use by the NGPA of per Btu prices requires the most "accurate" method of Btu measurement. But that claim overlooks the fact, shown earlier, that prices under the *NGA* were *also* on a per Btu basis, because of the Btu adjustments to ceiling prices required by the FERC, and it was also the *wet* method of measurement which was used in conjunction with those prices. What is necessary is that when one of the Btu measurement methods is adopted, it is made certain *that the per Btu ceiling prices are adopted in recognition of how the Btu's are to be measured.* That is what the FERC did, before the NGPA, when it adopted the wet method and set ceiling prices accordingly. The NGPA adopted those same prices for some categories of gas, and fixed compatible prices for the other categories of regulated gas, and it is therefore not credible that Congress silently switched only the Btu measurement method, thus changing the premises upon which the adopted prices had earlier been based. The Court of Appeals properly recognized this fact, and also recognized correctly that use of prices expressed in Btu's does not decide which method of measuring Btu's is to be

used, as Petitioners erroneously claim. (716 F.2d at 12-14).

The Court of Appeals also dealt at length with Petitioners' claims that even though the wet method was the one utilized by the FERC, it was not sufficiently "accurate" to have been utilized by the Congress. The Court of Appeals noted that although the NGPA sets precise prices, subject to inflation adjustments, the Congress not only knew that the wet method had been used, but also knew that full precision in other areas could not last past the date of enactment. For example, although an effort was made to allow some gas prices, at the time of enactment, to move nearer to the price of other fuels, it was obvious that there would be regional differences, since the prices of unregulated fuels—such as oil or coal—vary from area to area, whereas the NGPA sets nationwide gas rates. Further, the NGPA has multiple categories of gas, whereas other fuels generally do not. Additionally, whereas unregulated fuel prices change with market conditions, NGPA prices do not. In that regard, the Court of Appeals properly noted (716 F.2d at 14) that the final version of the NGPA did not contain a provision from earlier drafts which would have indexed the NGPA prices to domestic oil prices, which is another showing of international lack of precision in the NGPA, as enacted. As the Court of Appeals also noted (716 F.2d at 14), the Congress was not even "hyperaccurate" in its mathematics, since in a companion bill to the NGPA, Congress expressed a willingness to assume generally that each barrel of oil has 5.8 million Btu's, when in fact the Btu content varies with the type and quality of the particular oil in question. The Court of Appeals also noted that Congress at times referred to one million Btu's (MMBtu) and a thousand cubic feet (Mcf) of gas as equivalent, when in fact an Mcf may have more or less than a million

Btu's.[16] The Court of Appeals' point is not, as Petitioners' claim, that Congress did not know the difference between volume (Mcf) and heat content (Btu),[17] but rather that Congress felt the need to adopt simplying assumptions and did not try the impossible task of pushing accuracy to the decimal places. In that context, as the Court of Appeals correctly reasoned, Congress looked not to the degree of "accuracy" of Btu methods, but rather to the compatibility of the method with the prices which Congress selected: Congress did not select and state prices which had been developed on the basis of the wet method,

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[16] These references by the Court of Appeals are to the committee report accompanying the Energy Tax Act of 1978, Pub. L. No. 95-618, 92 Stat. 3174-3205 (1978). The producer Petition (p. 22) states that the "provisions" referenced "were contained only in a House version of that legislation" but that the Act "as enacted, does not contain these provisions." But that is grossly misleading, because the passages cited were not in the *act* at all, but in the committee *report*, so of course they were not in the act "as enacted". And the presence of the language in the report does show, as the Court of Appeals recognized, that Congress did intend to use standard assumptions, such as are involved in the wet method of measurement. In addition, the same assumption of rough equivalence in Btu's of an Mcf and one million Btu's also was made by House Commerce Committee Chairman Dingell, in discussing NGPA pricing sections, when he sometimes referred to NGPA prices in terms of dollars and cents *per Mcf, rather than per MMBtu*, again showing the Congressional assumption of rough Btu equivalency of a Mcf and one million Btu's. 124 Cong. Rec. H. 13117 (October 14, 1978). Further, the same reference was made in Ad Hoc Committee on Energy, Report to accompany H.R. 8444 H. Rep. No. 95-543, Vol. 1, 19 (July 27, 1977) and in a House Staff outline of the pricing proposals which resulted in the NGPA pricing provisions, issued March 8, 1978.

[17] At page 16 of its Petition, the FERC misleadingly suggests that the Court of Appeals said that Congress, to quote the Petition, "intended 'Btu' and 'Mcf' to be interchangeable". Of course, the Court of Appeals never said that: it simply pointed out the simplifying assumption of the Congress that each Mcf had 1000 Btu's of heat content, so that an Mcf would have *equivalent Btu's* to an *MMBtu* (not a Btu).

and then effectively changed them by secretly switching to the dry method, without saying so.[18]

Because the statutory scheme of the NGPA, the regulatory context in which the NGPA was enacted, and the relevant legislative history, all support the decision of the Court of Appeals, certiorari should be denied.

II. PETITIONERS ERR IN RELYING ON ARGUMENTS THEY DID NOT BRIEF TO THE COURT OF APPEALS AND WHICH ARE CONTRARY TO THE RATIONALE OF THE ORDERS UNDER REVIEW

The change of Btu calculation method which the FERC adopted, and the Court of Appeals reversed, was not done by the FERC as a matter of discretion, or exercise of technical competence. Instead, as the FERC's briefs in the Court of Appeals make clear, the FERC rested totally on its interpretation of the NGPA: the FERC has consistently said that it had no discretion, but instead acted pursuant to statutory mandate. Indeed, as the Court of Appeals pointed out (716 F.2d at 15), not only is the FERC's "technical experience with measuring Btu's" "of limited usefulness" in determining what Congress meant in setting ceiling prices for natural gas on a Btu basis, but the FERC itself conceded, at page 28, n.28 of its brief to that Court, that:

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[18] Thus, the FERC Petition's footnotes 13 and 14 (page 16) are irrelevant and misleading, since they do not proceed from what the Court of Appeals really said. Similarly, footnote 12 (page 12) of the FERC Petition draws conclusions from mathematical exercises *which are based on a premise which assumes the answer to the issue in this case*, because that footnote implicitly assumes that the measurement result which is reached by use of the dry method is "correct", and therefor what Congress intended, and then shows that the wet method does not reach that result. But the issue here is, rather, whether Congress intended to change to a dry basis, to be applied to prices which were set in light of the wet basis of measurement: it is incompatibility of Congressional and regulatory purpose, which Petitioners claim occurred, not technical techniques and accuracy of measurement, which is involved here.

> "Indeed, the Commission was given no independent authority under the NGPA to define 'Btu'."

Now, however, the FERC in its Petition here (pages 18-19, point 3) argues that:

> Even assuming that the 'as delivered' rule was not mandated by the NGPA, we submit that, at the very least, Congress left the matter to the ultimate discretion of the Commission.

On the merits, that post-hoc position is in error, as shown above. The FERC's position below is correct: it has been left no discretion by Congress. But in addition, the FERC cannot now be heard to take that new position, in view of its position taken in the Court of Appeals.[19] *See U.S.* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977) referring to an issue not raised below and stating "[a]bsent exceptional circumstances, we will not review it here". *See also Illinois* v. *Lance Gates*, 51 U.S.L.W. 4709 (June 8, 1983); *Duigan* v. *U.S.*, 274 U.S. 195, 200 (1926); *Neely* v. *Eby Construction Co.*, 386 U.S. 317 (1967).[20]

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[19] Indicated Producers also make the same claim in their Petition, and similarly cannot take the contrary position here. In their brief in the Court of Appeals, they made no suggestion that the FERC had any discretion to choose a Btu method: there was, instead, only pages of argument that the *NGPA mandated* use of the dry method. (A copy of the FERC and Producers briefs in the Court of Appeals have been filed with the Clerk of this Court, for convenience.)

[20] Similarly, in none of its orders, except No. 93-A, did the FERC give any reasons for its change of position. And examination of Order 93-A shows no exercise of expertise, but rather discussion of reasons why the NGPA allegedly supports a change of measurement method. Thus, the principles of SEC v. Chenery Corp., 332 U.S. 194, 196 (1946), stating that the action of an administrative agency is to be judged "solely by the grounds invoked by the agency," are relevant. Further, "[t]he Courts may not accept appellate counsel's post hoc rationalizations for agency action;" Burlington Truck Lines v. U.S., 371 U.S. 156, 168 (1962); NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443-444 (1965). See also American Textile Manufacturers v. Donovan, 452 U.S. 485 (1981). In this case, such post hoc rationalization is exhibited before this Court.

Clearly there are no "exceptional circumstances" in this proceeding to warrant allowing petitioners to here raise new issues.

It is obvious why the FERC and producers argued in the Court of Appeals that the NGPA required use of the dry method: they wanted to wrap themselves in a claimed Congressional mandate. If they had instead argued that the FERC had exercised discretion, then they would have been faced with the invalidity of the FERC orders on the bases described in Section IV, below: lack of basis shown for such "exercise", and equally invalidating procedural defects. Petitioners' entire argument in response to inadequate notice and opportunity for comment, and retroactive application of the dry method, was the claim that they were simply interpreting the statutory *mandate*. But now, faced with reversal by the Court of Appeals' opinion, Petitioners seek to assume a fallback position that although the NGPA does not mandate the dry basis, the FERC has "discretion" to adopt it. Even if Petitioners were allowed to argue discretion, the FERC orders here under review are, we submit, nevertheless invalid on the bases described above and in Section IV, including the fact that no basis for exercise of discretion is stated in the FERC orders.[21] To have such invalidity judicially determined, this case would presumably be remanded to the Court of Appeals, which was not required to reach those questions. If that court held the FERC orders invalid on the bases set forth in Section IV hereof, then

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[21] At page 19, the FERC Petition alleges that the Court of Appeals "did not even attempt to make" a finding that such alleged FERC exercise of discretion was invalid: did not find "the Commission's action in issuing the Btu rule was arbitrary, capricious, or an abuse of discretion". The reason such terms were not used by the Court of Appeals is that the FERC, and the producers, did not claim the exercise of, or right to exercise, discretion: they claimed statutory mandate only. In view of that situation, Petitioners below (Respondents here) also did not deal with the question of whether the FERC exercised discretion lawfully: that question was not—and is not now—relevant or properly raised.

the FERC, if it wished to then exercise its alleged "discretion" and change to the dry Btu method, would be required to go through a new, validly conducted, rulemaking process to develop a new rule—with valid support, if it could find any—to be applied prospectively thereafter.

That result is not indicated herein, however, because the NGPA mandates the *wet* method, as the Court of Appeals properly held; and Petitioners are barred from the claim that the FERC has discretion, as shown earlier in this section. In addition, the NGPA does not give the FERC discretion to make the *type of choice*, with its major consequences involved, which abandonment of the wet method, in favor of the dry method, constitutes. The consequence of such abandonment is, of course, an increase of about 1.7% in the maximum price for all gas sold in the nation, from December 1, 1978 to the present, and on into the future. That is no "technical detail", or formulation of a definition, or a step to "refine definitions", as the FERC Petition claims; it is a substantive policy choice. Adoption of a new, changed method for measurement of the number of Btu's in a given volume of gas is not a definition. Btu is clearly defined, in the NGPA, and is a well known term. The definition of that term is not in issue. Petitioners cite H.R. Conf. Rep. 95-1752, 95th Cong., 2d Sess. (1978), which states that the FERC may "refine definitions of terms provided in the act in a manner that is consistent with the definitions provided." But that same language also appears in Rep. No. 95-496, Part 4, 95th Cong., 1st Sess. 103 (1977), which addressed H.R. 6831 and H.R. 8444, forerunners of the NGPA which has been discussed earlier. And that same Report also provides that the pricing provision of the bill "incorporates Btu adjustments . . . provided for in FPC rate determinations." Thus, it is clear that Congress did not see any need for FERC "refinement" of the term Btu to provide for measurement methodolgy: the bill had already been drafted on the basis that the method previously prescribed by the FERC—the wet method—is to be used.

III. THE COURT OF APPEALS GAVE APPROPRIATE CONSIDERATION AND DEFERENCE TO THE STATUTORY INTERPRETATION OF THE FERC

Both Petitions argue that the Court of Appeals' decision should be reversed because it allegedly failed to give deference to FERC expertise. That argument is in error, both factually and legally. First, the Court of Appeals was well aware of its responsibility to afford due deference to the FERC position. Each of the reasons advanced by the FERC for its change of Btu calculation method was carefully evaluated by the Court of Appeals: that is obvious throughout the opinion, proceeding from the Court of Appeals' statement that:

> In evaluating the petitioners' position, and concomitantly the Commission's (and producer-intervenors') contrary view of the statute, it is our responsibility to measure the parties' arguments in light of the language, legislative history, purpose, and structure of the NGPA, according the Commission the traditional respect due an agency's interpretation of the statute it is called upon to enforce. (716 F.2d at 10).

After concluding its exhaustive analysis of the FERC arguments, the Court of Appeals found:

> Even according the Commission's rationale for the dry rule the respect traditionally due an agency's statutory interpretation, *see, e.g., FEC* v. *Democratic Senatorial Campaign Comm'n*, 454 U.S. 27, 39 (1981); *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977), we find the Commission's dry rule—whether characterized as legislative or interpretative—to be fundamentally at odds with the Btu measurement technique implicit in the NGPA. (716 F.2d at 15).

It is thus obvious that the Court of Appeals was aware of, and followed, its responsibility of deference to the FERC's decision. But such deference clearly has limits, if the Courts are not to be mere rubber stamps. That principle is established. The FERC decision has failed the test. There has been no failure of proper deference by the

Court of Appeals. Instead, there has been a disregard by the FERC of the purpose and legislative history of the NGPA, as described in detail above.

The applicable principles in these proceedings relative to deference were stated by this Court in an unanimous decision on November 29, 1983, where the Court noted the "considerable deference" due the Federal Labor Relations Authority (FLRA), but reversed the FLRA, and the Court of Appeals' affirmance, stating:

> On the other hand, the 'deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). Accordingly, while reviewing courts should uphold reasonable and defensible constructions of an agency's enabling Act, *NLRB* v. *Iron Workers, supra*, at 350, they must not 'rubber-stamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965). See *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971. Guided by these principles, we turn to a consideration of the FLRA's construction of § 7131(a). (*Bureau of Alcohol, Tobacco and Firearms* v. *F.L.R.A.*, 52 U.S.L.W. 4013, 4015 (November 29, 1983) (footnote omitted)).

The same principles have been frequently enunciated by this Court in cases not cited in the above case. *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980) relevantly notes that a finding that Congress silently changed "carefully prescribed" provisions of the statute was not credible and rejected the agency finding, despite claims of "deference". In *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), the Court noted that "Courts need not defer to an administrative construction of a statute where there are 'compelling indication that it is wrong.'" See also *Mobil Alaska Pipeline Co.* v. *U.S.*, 436 U.S. 631

(1978); *Adamo Wrecking Co.* v. *U.S.*, 434 U.S. 275 (1978); *Shaw* v. *Vialpando*, 416 U.S. 251 (1974); *SEC* v. *Sloan*, 436 U.S. 103 (1978); *Morton* v. *Ruiz*, 415 U.S. 199 (1974); *Fed. Maritime Comm'n* v. *Seatrain Lines*, 411 U.S. 726 (1973); *Barlow* v. *Collins*, 397 U.S. 159 (1970); *McKart* v. *U.S.*, 395 U.S. 185 (1969); *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968); *FTC* v. *Colgate-Palmolive*, 380 U.S. 374 (1965); *American Ship Building* v. *NLRB*, 380 U.S. 300 (1965); *Neuberger* v. *Comm'r of IRS*, 311 U.S. 83 (1940). See also *Texas Gas Transmission Co.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), where this Court also upheld a Court of Appeals' rejection of a FERC *contract* interpretation. Where, as here, the administrative agency's contemporaneous interpretation is later changed by the agency, even less deference is due. *Watt* v. *Alaska*, 451 U.S. 259 (1981); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).[22]

Petitioner Producers, but not Petitioner FERC, even claim that *Public Service Comm'n* v. *Mid-Louisiana Gas Co., et al.*, —— U.S. ——, 51 U.S.L.W. 5030 (June 28, 1983) supports their position, because there the FERC was reversed for failing to follow the NGPA. Here, the producers assert, the FERC did follow the NGPA, but that assumes the answer to the issue in the case. The relevance of Mid-Louisiana is, instead, that there the Court of Appeals reversed the FERC's erroneous interpretation of the NGPA, and was upheld by this Court. The same result is appropriate here.[23]

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[22] The bulk of the cases cited by Petitioners in support of their claim that automatic affirmance of the FERC, through "deference", is warranted, involve affirmance of a *contemporary* agency construction which is also consistent with the Act, neither of which are the case here.

[23] The Court's statement, at 51 U.S.L.W. at 5035, that "Congress would have clearly identified, either in the statutory language or in the legislative history, any significant source of production that was intended to be excluded" is relevant here. There, the FERC ignored that principle, just as in the subject case, the FERC has ignored

[footnote continued on next page]

IV. THERE ARE ADDITIONAL VALID BASES FOR REVERSING THE FERC ORDERS, WHICH THE COURT OF APPEALS WAS NOT REQUIRED TO CONSIDER

If it were to be held that, contrary to Sections I and II, supra, the FERC was empowered by the NGPA to adopt the dry method of Btu measurement, the orders of the Commission which were reversed by the Court of Appeals would still be invalid, on the basis that:

A. The regulation issued on the December 1, 1978 effective date of the NGPA did not mention the dry measurement method, and the notice thereof which had been issued two weeks before, also did not prescribe or mention such method. Further, the next two orders issued—over nineteen months and two years later, respectively—did not amend that regulation. Therefore, there was no valid notice of the allegedly proposed change of method, and thus no opportunity to timely comment thereon, which violates the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.* (which is applicable, *inter alia*, pursuant to Section 502(a) of the NGPA), ruling case law and constitutional due process.

B. As noted above, the FERC obviously articulated no rationale and basis for exercise of discretion to adopt the dry method. Thus, if it were held that the FERC has such discretion, and is not required to adopt a particular method, its orders are nevertheless invalid for failure to articulate and explain the basis for its decision.

> When the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp. v Labor Board, 313 US 177, 197, 85 L ed 1271, 1284, 61 S Ct 845, 133 ALR 1217. See Burlington Truck Lines v United States,

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the fact that Congress has given no indication of a change from the wet method of Btu calculation, despite the huge dollar significance which that step would have.

371 US 156, 167-169, 9 L ed 2d 207, 215, 216, 83 S Ct 239; Interstate Commerce Comm'n v J-T Transport Co. 368 US 81, 93, 7 L ed 2d 147, 156, 82 S Ct 204. *NLRB* v. *Metropolitan L. Ins. Co.*, 380 U.S. 438 (1965).

See also, SEC v. *Chenery Corp.*, 332 U.S. 194, 196 (1946).

C. The FERC made its claimed change to the dry method effective December 1, 1978, over three years prior to the issuance of the regulation which provided for such method, and over nineteen months and two years, respectively, before the orders which stated such method should be used (but did not so provide by regulation). Such action violates established principles of law relative to retroactive application of regulations and decisions. Such retroactive application would drastically increase the economic burden to gas consumers, and would cause severe economic loss to pipeline purchasers of gas which are unable to recover retroactive costs from customers served in sales not subject to the jurisdiction of the FERC.

D. The FERC orders did not unequivocally provide that pipelines subject to FERC jurisdiction could recover in their rates, the increased prospective and retroactive costs which would be caused by such orders.

Because the Court of Appeals held that the FERC was prohibited by the NGPA from changing Btu measurement methods, that Court did not reach the above errors of the FERC. A contrary holding by this Court relative to statutory interpretation would, we submit, leave the FERC orders nevertheless invalid, on the above grounds.

V. THERE IS NO CONFLICT OF COURTS OF APPEALS DECISIONS TO BE RESOLVED, AND THERE WILL BE NONE

The questions involved here will not recur. They concern a discrete matter of interpretation of a provision of the NGPA, and the affected parties have appealed the

FERC orders to a single Court of Appeals. There is no conflict of lower court decisions to be resolved here, and none will be created in the future.

VI. THE COURT OF APPEALS' DECISION DOES NOT CAUSE REGULATORY OR ADMINISTRATIVE PROBLEMS OR BURDENS

The Court of Appeals' decision involved here requires the FERC and the natural gas industry to continue to utilize the method of Btu calculation universally used by the FERC and the interstate segment of the industry for many years, as well as by at least a large proportion of the intrastate segment of the industry. Thus, it is obvious that no regulatory or administrative problems or burdens are created for the FERC or the industry.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATEMENT OF POLICY

26 Fed. Reg. 4614 (1961)

The relevant portions of the FPC's proposed rule in the Statement of Policy read as follows (emphasis added):

§ 2.60 Standards to be considered in determining independent producer's gas to be of "pipeline quality."

(a) "Pipeline quality gas" shall be natural gas which when measured at 14.73 psia at 60 degrees F:

(1) Shall have a heating value of not less than one thousand (1,000) Btu per cubic foot *when saturated with water vapor* (i.e. water saturated gas having a heating value per cubic foot on nine hundred seventy-five (975) Btu to one thousand and twenty-five (1,025) Btu shall be deemed to comply with this requirement), but in no event shall buyer be required to accept natural gas having a heating value of less than nine hundred and fifty (950) Btu per cubic foot, (emphasis added)

• • • •

§ 2.61 Price adjustments for deviations from standards.

(a) Prices per Mcf when measured at 14.65 psia as prescribed by the Commission for the various producing areas shall be reduced for deviations from the standards as follows:

(1) For gas of less than 975 Btu per cubic foot, by an amount equal to

$$\frac{1{,}000\text{—Actual heating value}}{1{,}000} \times \text{area price}$$

APPENDIX B

18 C.F.R. 2.56a(c)(1)

(1) *Btu Adjustment.* (i) For natural gas containing more than 1,000 Btu's per cubic foot, at 60°F. and 14.73 psia, *upward adjustments* shall be made on a *proportional* basis from a base of 1,000 Btu's per cubic foot; and for natural gas containing less than 1,000 Btu's per cubic foot, at 60°F. and 14.73 psia, *downward adjustments* shall be made on a *proportional* basis from a base of 1,000 Btu's per cubic foot. (emphasis added)

* * * *

(iii) The Btu content of the natural gas used in computing this rate adjustment shall be the number of British thermal units (Btu) produced by the combustion, at constant pressure, of the amount of the gas which would occupy a volume of 1.0 cubic foot at a temperature of 60°F. *saturated with water vapor* and under a pressure equivalent to that of 30.00 inches of mercury at 32°F. and under standard gravitational force (980.665 centimeters per second squared) with air of the same temperature and pressure as the gas, when the products of combustion are cooled to the initial temperature of the gas and air and when the water formed by combustion is condensed to the liquid state. (emphasis added)

The above provision pertains to sales from natural gas from wells commenced on or after January 1, 1973, and certain other sales. Identical language to that quoted above is also found in 18 C.F.R. 2.56b(d)(1), which pertains to sales of natural gas from wells commenced prior to January 1, 1973.

LISTING OF AFFILIATES PURSUANT TO RULE 28.1

Listed below, pursuant to Rule 28.1 of the Supreme Court of the United States, are the Respondents, and the Intervenor below, which submit this Brief In Opposition, and the affiliates thereof.

Michigan Wisconsin Pipe Line Company *

American Natural Alaskan Company
American Natural Arctic Company
American Natural Resources Company
American Natural Service Company
ANG Coal Gasification Company
ANR Coal Company
ANR Freight System, Inc.
ANR Gasification Properties Company
ANR Media Company
ANR Storage Company
ANR Western Coal Development Company
ANR Western Storage Company
Associated Central Terminal Company
Associated Trucklines, Inc.
Brooks Run Coal Company
Enterprise Coal Company
Garrett Forwarding Company
Garrett Freightlines, Inc.
Garrett Terminal Corporation
Graves Truck Line, Inc.
Great Lakes Gas Transmission Company
The Luper Transportation Company
New Life Transport Parts Center, Inc.
Road Equipment Financing, Inc.
Road Equipment, Inc.
VICC Land Company
VICCO Coal Company

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* On January 1, 1984, the name of Michigan Wisconsin Pipe Line Company was changed to ANR Pipeline Company.

VICCO International Sales Corporation
VICCO Leasing Company
Virginia Iron, Coal and Coke Company

Northern Natural Gas Company
(a Division of InterNorth, Inc.)

Consolidated Gathering Systems Limited
Consolidated Natural Gas Limited
Consolidated Pipe Lines Company
Consolidex Gas and Oil Limited
Hydrocarbon Transportation, Inc.
I N Holdings, Inc.
Nortex Gas & Oil Company
Northern Arctic Gas Company
Northern Arrow Inc.
Northern Border Pipeline Corporation
(Subsidiary of Northern Plains Natural Co.)
Northern Coal Company
Northern Eagle Inc.
Northern Engineering International Co.
Northern Gas Products Company
Northern Helex Company
Northern Liquid Fuels International Ltd.
Northern Minerals Company
Northern Overthrust Pipeline Company
Northern Petrochemical Company
Northern Plains Natural Gas Company
Northern Propane Gas Company
Northern Trailblazer Pipeline Company
Northern Vocational Training Company
The Protane Corporation
UPG, Inc.

Natural Gas Pipeline Company of America
(a wholly-owned subsidiary of MidCon Corporation)

Exeter Drilling Company
Industrial Fuels Corporation
NAAACO, Inc. (Del.)

NALOCO, Inc. (Del.)
NANBCO Inc.
NAPECO Inc.
NATOCO, Inc.
Natural-Trinidad and Tobago Engineering Company
NGPL-Canyon Compression Co.
NGPL Exploration Company
NGPL Liquids, Inc.
NGPL-Overthrust, Inc.
NGPL Terminal Company
NGPL-Trailblazer, Inc.
NGPL Williston, Inc.
NGPL Offshore Company
MCN Exploration Company
NAERCO, Inc.
NGP-LNG, Inc.
MCN Overseas Inc.
MCN-Trinidad and Tobago LNG Company
MCN Coal Gasification Company
Harper Oil Company
Texoma Production Company
Buckhorn Petroleum Co.
Anthrust, Inc.
MCN Acadian Gas Pipeline Corp.
MCN Bayou Interstate Pipeline Corp.
MCN Calcasieu Gas Gathering Corp.
MCN Equities, Inc.
MCN Louisiana Industrial Gas Supply Corp.
MCN Pelican Interstate Gas Corp.
MCN Pelican Transmission Corp.
MCN Research, Inc.
MCN Spindletop Gas Distribution Corp.
MCN Technologies, Inc.
MCN-TEX Corp.
MCN Transmission, Inc.
MidCon International N.V.
MidCon Hydrocarbons Corp.
MidCon Louisiana Pipeline Corp.
MidCon Mississippi Natural Gas Pipeline Corp.

MidCon Oklahoma Natural Gas Pipeline Corp.
MidCon Texas Pipeline Corp.
MidCon Ventures, Inc.
Mississippi River Transmission Corp.
MCN Transmission, Inc.
Exeter Capital Corporation
Exeter Service Company
TPC Pipeline Company
Exeter Canadian Exploration, Ltd.
Exeter Exploration Company
E. K. Coal Co. Inc.
Empire Coal Company
Fairway Coal Company
Industrial Fuels Equipment Company
Industrial Fuels Leasing Corporation of Ohio
Industrial Fuels Minerals Company
Prater Creek Processing Company
Red Cedar Mining Company, Inc.
Twin Oaks Coal Company
UMET Mining Corporation
Chapperal Coal Corporation
Westcoal Corporation
Wolvering Mining Corporation

Mississippi River Transmission Corporation

(a wholly-owned subsidiary of MCN Transmission Inc., which is a wholly-owned subsidiary of MidCon Corporation).

Transcontinental Gas Pipe Line Corporation

Alapost Corp.
Border Gas, Inc.
C&T Pipeline, Inc.
Dixie Pipeline Company
Gasco Insurance Company, Limited
High Island Offshore System
TCI Realty, Inc.
Towtrans Company
Transco Canada Pipeline Company

Transco Coal Company
Transco Coal Gas Company
Transco Coal Pipeline Company
Transco Development Company
Transco Exploration Company
Transco Finance Company
Transco Gas Clearing House Company
Transco Gas Supply Company
Transco Hydrocarbon Company
Transco International N.V.
Transco LGP Company
Transco-New England Pipeline Company
Transco Offshore Pipeline Company
Transco Peat Methanol Company
Transco Propane Supply Company
Transco Production of Canada Ltd.
Transco Propane Products Company
Transco Synfuels Company
Transco Terminal Company
Transco Tower Realty, Inc.
Trans-Jeff Chemical Corporation
TXP Operating Company
U-T Offshore System
NESP Supply Corp.

Interstate Natural Gas Association of America

The above named association has the following members.

Active Membership

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
ANR Pipeline Company
Black Marlin Pipeline Company
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Continental Resources Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.

Great Lakes Gas Transmission Company
KN Energy, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
MidCon Corporation
Mid Louisiana Gas Company
Mitco Pipeline Company
Northern Natural Gas Company
Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Co.
Panhandle Eastern Corporation
Ringwood Gathering Company
Southern Natural Gas Company
Tennessee Gas Transmission Company
Texas Eastern Transmission Corp.
Texas Gas Resources Corporation
Transco Energy Company
United Gas Pipe Line Company
Valero Interstate Transmission Co.
Valley Gas Transmission, Inc.
Western Transmission Corporation

Associate Members

Amoco Production Company
ARCO Oil and Gas Company
Arkansas Louisiana Gas Company
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Chevron USA
Conoco Inc.
Enstar Petroleum, Inc.
Entex, Incorporated
Exxon Company, U.S.A.
Forest Oil Corporation
Getty Oil Company
Gulf Oil Exploration and Production Co.
John H. Hill
HNG Fossil Fuels Company

HNG Oil Company
Kinsey Interests
Laclede Gas Company
Lear Petroleum Exploration, Inc.
LGPC Exploration, Inc.
Marathon Oil Company
Minerals, Inc.
Mitchell Energy & Development Corp.
Mobil Oil Corporation
National Fuel Gas Company
Natural Resources Corporation
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Southern Union Company
Sun Gas Company
Union Oil Co. of California